

IP 05-0200-M 1 F US v Brown  
Magistrate Kennard P. Foster

Signed on 5/27/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES OF AMERICA,

Plaintiff,

V.

DEMETREOUS BROWN,

Defendant.

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CAUSE NO. IP 05-200M-01

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CAUSE NO. IP 05-200M-01
DEMETREOUS BROWN,	)	
	)	
Defendant.	)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant is charged in a criminal complaint issued on May 17, 2005, with three counts of distribution of 50 grams or more of a mixture or substance containing a detectable amount of cocaine base (crack cocaine), a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 841(b)(1)(A)(iii); one count of distribution of a mixture or substance containing a detectable amount of cocaine base (crack cocaine), a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §841(a)(1); and one count of carrying a firearm in furtherance of a drug trafficking crime, in violation of Title 18 U.S.C. §924(c). On May 17, 2005, at the initial appearance, the government filed a written motion that moved for detention pursuant to Title 18 U.S.C. §§3142(e), (f)(1)(B), (f)(1)(C), and (f)(2)(A) on the grounds that the defendant is charged with an offense for which the maximum sentence is life imprisonment, a drug trafficking offense with the maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, and the

defendant is a serious risk of flight, if released. The detention hearing was held on May 20, 2005. The United States appeared by Barry D. Glickman, Assistant United States Attorney. Mr. Brown appeared in person and by his appointed counsel, James C. McKinley, Assistant Indiana Federal Community Defender.

At the preliminary hearing, the Government rested on the complaint and the affidavit attached thereto and tendered Special Agent Reifel, Federal Bureau of Investigation, for cross examination. Counsel for Mr. Brown examined Special Agent Reifel on all issues before the Court. Mr. Brown presented no additional evidence in the preliminary hearing, and the preliminary issue as to the defendant was submitted to the Court. The Court found that the evidence constituted probable cause to believe that the defendant committed the crimes charged in the complaint. The charges in the criminal complaint give rise to the presumptions that there is no condition or combination of conditions of release which will reasonably assure the safety of the community or that the defendant will not be a serious risk to flee if released.

At the detention hearing, counsel for the defendant presented no evidence.

The defendant did not rebut either the presumption that he is a danger to the community or the presumption that he is a risk of flight and, consequently, was ordered detained.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The defendant, Demetreous Brown is charged in a criminal complaint issued on May 17, 2005, with three counts of distribution of 50 grams or more of a mixture or substance containing a detectable amount of cocaine base (crack cocaine), a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 841(b)(1)(A)(iii); one count of distribution of a mixture or substance containing a detectable amount of cocaine base

(crack cocaine), a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §841(a)(1); and one count of carrying a firearm in furtherance of a drug trafficking crime, in violation of Title 18 U.S.C. §924(c).

2. The penalty for distribution of 50 grams or more of a mixture or substance containing a detectable amount of cocaine base (crack cocaine), a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §841(a)(1), is a mandatory minimum sentence of ten (10) years and a maximum of life imprisonment. Title 21 U.S.C. § 841(b)(1)(A)(iii). The penalty for distribution of a mixture or substance containing a detectable amount of cocaine base (crack cocaine), a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §841(a)(1), is up to twenty years imprisonment. Title 21 U.S.C. § 841(b)(1)(C). The penalty for carrying a firearm in furtherance of a drug trafficking crime, in violation of Title 18 U.S.C. §924(c), is a term of imprisonment of not less than five years and a maximum of life imprisonment.

3. The Court takes judicial notice of the criminal complaint in this cause. The Court further incorporates the evidence admitted during the preliminary hearing and the detention hearing, as if set forth here.

4. At the preliminary hearing, the Government rested on the complaint and the affidavit attached thereto and tendered Special Agent Reifel, Federal Bureau of Investigation, for cross examination. Counsel for Mr. Brown examined Special Agent Reifel on all issues before the Court. Mr. Brown presented no additional evidence in the preliminary hearing, and the preliminary issue as to the defendant was submitted to the Court.

5. The Court finds there is probable cause for the offense the defendant is charged with in the complaint, and the rebuttable presumptions arise that the defendant is a serious risk of flight and a danger to the community. Title 18 U.S.C. § 3142(e).

6. The defendant presented no additional evidence at the detention hearing.

7. The Court admitted a Pre-Trial Services Report (PS3) regarding Mr. Brown on the issue of his release or detention. Mr. Brown is age 24 (DOB 8-28-80). The PS3 indicates the following:

(A) On May 22, 2002, he was convicted of three counts of Pointing A Firearm (Class D Felonies) and Battery (Class A Misdemeanor) in Marion County, Indiana, and was sentenced to 1095 days imprisonment (545 days suspended) on the Pointing A Firearm charges and 365 days (executed) imprisonment on the Battery charge.

(B) He failed to appear for a previous proceeding.

(C) He has a history of substance abuse.

8. The defendant has failed to rebut the presumption that he is a serious risk of flight, and a danger to the community and any other person. Therefore, Demetreous Brown is ORDERED DETAINED.

9. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible

for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, Title 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, §3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. Title 18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. See *United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moves for detention pursuant to §3142(f)(1)(B) (C), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of §3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. Title 18 U.S.C. §3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir.

1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant’s appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

10. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendants’ appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, Title 21 U.S.C. §801 *et seq.*; the Controlled Substances Import and Export Act, Title 21 U.S.C. §951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. §1901 *et seq.*, for which a maximum

term of imprisonment of ten years is prescribed; (2) Title 18 U.S.C. §924(c); (3) Title 18 U.S.C. §956(a); or (4) Title 18 U.S.C. §2332b. Title 18 U.S.C. §3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a §3142(e) presumption is not such a “bursting bubble”. *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress’ finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case and have not been rebutted.

11. If Mr. Brown had rebutted the presumptions, the Court would consider the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390,



1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

12. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

- a. On four separate occasions beginning on July 27, 2004, and continuing through February 10, 2005, law enforcement agents from the FBI and Marion County Sheriff's Department were conducting an investigation of Brown's drug dealing activities and made purchases of large amounts of crack cocaine from Brown.
- b. On July 27, 2004, during one of the controlled purchases Brown produced a 9 mm semiautomatic handgun, which he subsequently sold to a undercover law enforcement agent.
- c. The evidence demonstrates a strong probability of conviction.
- d. The three separate mandatory minimum sentences of ten (10) years for three of the distribution charges, when coupled with the fact that defendant has failed to appear for a court proceeding in the past, and his propensity to abuse controlled substances, substantially increases the seriousness of his risk for flight.
- e. The defendant's possession of a firearm after having been convicted of a felony offense demonstrates the dangerousness of the defendant.

The Court having weighed the evidence regarding the factors found in Title 18 U.S.C. §3142(g), and based upon the totality of evidence set forth above, concludes that even though the defendant has rebutted one of the presumptions in favor of detention, he nevertheless, should be detained, because he is a serious risk of flight and clearly and convincingly a danger to the community.

WHEREFORE, Demetreous Brown is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this      day of May, 2005.

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Kennard P. Foster, Magistrate Judge  
United States District Court

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